87-1987

No. .....

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1987

—o—

DONALD H. MOORE,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

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38 pp

QUESTIONS PRESENTED

1. WHETHER THE AFFIRMATIONS OF THE THIRD CIRCUIT COURT OF APPEALS AND THE MIDDLE DISTRICT OF A FINDING BY A SPECIAL BOARD OF ADJUSTMENT DENYING BACK PAY AND OTHER BENEFITS, DESPITE A FINDING THAT THE URINE TEST RELIED UPON WAS NOT COMPETENT EVIDENCE BECAUSE CONSOLIDATED RAIL CORPORATION FAILED TO PRESENT ADEQUATE EVIDENCE AS TO THE CHAIN OF CUSTODY OF THE URINE SAMPLE RENDERING THE FINDING WHOLLY BASELESS AND WITHOUT REASON, ARE IN ERROR.

2. WHETHER ANY INDIVIDUAL'S FOURTH AMENDMENT RIGHT TO PRIVACY NECESSITATES THE USE OF CAREFULLY SAFEGUARDED DRUG TESTING PROCEDURES AS FOUND IN THE FEDERAL RULES OF EVIDENCE.

PARTIES BELOW

Petitioner/Appellant/Petitioner Below
Donald H. Moore

Respondents/Appellees/Respondents Below
Consolidated Rail Corporation

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B. IT IS AGAINST PUBLIC POLICY TO ALLOW SPECIAL BOARDS OF ADJUSTMENT TO RULE ON MATTERS WITH NO COMPETENT EVIDENCE AS A BASIS FOR THE DECISION AND TO ALLOW THAT DECISION TO STAND ABSOLUTE WITH NO REVIEW AVAILABLE TO THE PARTIES INVOLVED 11

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No. .....

In The

Supreme Court of the United States

October Term, 1987

DONALD H. MOORE,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Donald H. Moore seeks a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit in Case No. 87-5739, *Moore v. Consolidated Rail Corporation,* unreported (3rd Cir. 1988).

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is unreported, it is reproduced in Petitioner's Appendix ("P. App.") at 1A through 6A. The original Memorandum and Order of the United States District Court for the Middle District of Pennsylvania dismissing Petition for review of an award made by Special Board of Adjustment is unreported; it is reproduced in P. App. at 9A through 14A. The decision of the Special Board of Adjustment finding the urine test results unreliable and reinstating Petitioner without back pay is reproduced at P. App. 15A through 20A.

JURISDICTION

On March 11, 1988, the Third Circuit Court entered judgment affirming the District Court's dismissal of the Petition for review of the award of the Special Board of Adjustment. Based on the Third Circuit's entry of judgment, this Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1) (1982).

STATUTE INVOLVED

42 U.S.C. Section 153 (First).

STATEMENT OF THE CASE

Donald H. Moore has been, with the exception of one interruption due to the improper firing, an employee of Consolidated Rail Corporation from 1971 until the present. Consolidated Rail Corporation is a Railway Carrier as defined by the Railway Labor Act.

In his years of service for Consolidated Rail Corporation, Donald H. Moore had a good record. Prior to July of 1985, there was not a scintilla of evidence Donald H. Moore ever engaged in the consumption of illegal drugs. In July of 1985, an anonymous phone caller claimed that Donald H. Moore was a drug user. Consolidated Rail Corporation forced Donald H. Moore to submit to a urine test on July 25, 1985, based solely upon this anonymous phone call.

Consolidated Rail Corporation promptly lost the sample and then discovered the sample. Despite the fact that the sample was lost, Consolidated Rail Corporation attempted to have the sample analyzed. The sample was found to be of insufficient confirming value.

Consolidated Rail Corporation then forced Donald H. Moore to submit to a second test on August 2, 1985. Donald H. Moore was then fired. Donald H. Moore appealed this decision and hearing was held on September 6, 1985 and September 19, 1985. These hearings were before a Hearing Officer as required by the Railway Labor Act.

After the hearings, the Hearing Officer upheld the decision to terminate Donald H. Moore. Donald H. Moore filed a timely Appeal and a review of this decision was conducted by the Special Board of Adjustment. Donald

H. Moore demanded, on Appeal, removal of the discipline and payment for all time lost, including reasonable compensation for mental and physical distress, traveler's benefits, dental plan, Title VII allowance, vacation rights and retirement benefits.

On December 22, 1986, the Special Board of Adjustment overturned the decision of the Hearing Officer and held that Donald H. Moore was to be reinstated. A copy of the findings of the Special Board of Adjustment is set forth at P. App. 15a through 20a.

The Special Board of Adjustment held that Donald H. Moore had a "good prior record" (P. App. 15a) in his 15 years as a locomotive engineer and that there was not competent indication that Donald H. Moore had engaged in the conduct of which he was accused prior to the incident which led to his wrongful dismissal.

The Special Board of Adjustment further held that competent evidence was not presented supporting Donald H. Moore's dismissal and that, therefore, Donald H. Moore should be reinstated.

The Special Board of Adjustment found:

> ". . . this Board would not have reinstated claimant . . . if the record had established a reasonable doubt that claimant could be relied upon as an engineer." (P. App. 19a).

The decision of the Board mentions two drug tests which were used to determine whether Donald H. Moore used marijuana. The first test was of July 25, 1985, which was lost and then found to be of insufficient confirming value. A second sample was taken on August 2, 1985. This

sample and subsequent analysis of the sample was held to be irrelevant by the Board.

The Board noted that the rights of individual employees must be protected when it comes to handling of urine samples. The Board found that there was ". . . no clear evidence as to the chain of possession", (P. App. 18a). As a result, the Board ordered that Donald H. Moore be reinstated as an employee.

Article G-C-9 of the Collective Bargaining Agreement provides that where discipline is expunged, the employee is to be paid for lost wages (P. App. 21a through 23a). Despite the aforementioned holdings of the Board as to the urine samples and the Collective Bargaining Agreement, the Board ordered that Donald H. Moore was to be reinstated without back pay. No explanation was provided for the Board's decision to deny back pay.

On June 30, 1987, this action was commenced by Donald H. Moore's Petition for Review and Enforcement under Section 3 (First) of the Railway Labor Act. Consolidated Rail Corporation was the named Respondent.

Donald H. Moore was discharged by Consolidated Rail Corporation on September 24, 1985, for the alleged use of marijuana. Pursuant to the Railway Labor Act, Donald H. Moore challenged this decision at a hearing before a Hearing Officer. The Hearing Officer decided in favor of Consolidated Rail Corporation and Donald H. Moore appealed to the Special Board of Adjustment. The

Special Board of Adjustment rendered a decision reinstating Donald H. Moore, but denying back pay as well as other benefits. (P. App. 15a through 20a). Donald H. Moore appealed this decision to the United States District Court by filing the aforementioned Petition.

On August 17, 1987, Consolidated Rail Corporation filed a Motion to Dismiss the Petition. On September 25, 1987, the Honorable William Caldwell of the Middle District Court of Pennsylvania issued a Memorandum and Order granting Consolidated Rail Corporation's Motion to Dismiss the Petition.

———o———

REASONS FOR GRANTING THE PETITION

The decision of the Third Circuit is in direct conflict with the provisions of the controlling statute, 42 U.S.C. Section 153(q) (First). The Petition of review of the findings of the Special Board of Adjustment was proper in that the findings of the Board were wholly baseless and without reason. In addition it is completely against the ideals of the Constitution of the United States to allow a judicial entry to exist and concurrently exercise legislative and executive powers as this Special Board has done, particularly in an area of such sensitivity as drug testing, requiring special attention and review procedures to ensure the protection of employees' rights.

A. THE DECISION BELOW IS CONTRARY TO THE STATUTE, 42 U.S.C. SECTION 153 (FIRST), IN THAT THE FINDING OF THE SPECIAL BOARD OF ADJUSTMENT TO DENY BACK PAY AND OTHER BENEFITS, RELYING ON A URINE TEST FOUND NOT TO BE COMPETENT EVIDENCE BECAUSE OF A LACK OF ADEQUATE EVIDENCE AS TO THE CHAIN OF COMMAND, IS WHOLLY BASELESS AND WITHOUT REASON, MAKING FEDERAL JUDICIAL REVIEW PROPER AND JUST.

Since Subsection (q) of U.S.C. Section 153 (First) provides that the Board's decision forms the basis for Appellate review, the language of the decision is obviously critical. The Board noted that Donald H. Moore had a "reasonably good record" (P. App. 15a), and that there was apparently no suspicions that Donald H. Moore used drugs until a single, anonymous phone caller made this serious accusation. (P. App. 16a).

As a result of this anonymous phone call, Consolidated Rail Corporation forced Donald H. Moore to submit to a urine test on July 25, 1985. This test, however, was lost and subsequently reappeared and was determined to be insufficient confirming value. (P. App. 16a). Consolidated Rail Corporation proceeded to require Donald H. Moore to submit to a second urine test which he complied with on August 2, 1985. (P. App. 16a). The second test was found to be positive. (P. App. 17a). Upon review, the Board stated that "no clear evidence as to the chain of possession during transit" was presented as to this second test. (P. App. 18a).

The Board correctly noted that:

> ". . . the gravity of the drug problem does not relieve any employer from making certain that the engi-

> neer is accorded all the procedural protection that elementary principles of due process, fair play and common sense require. Mere suspicion, conjecture and hearsay may never be substituted for competent proof." (P. App. 17a).

The Board scrutinized the evidence and properly held that the positive reading from the August 2, 1985 test would not support the firing because of the lack of evidence as to chain of custody.

Chain of possession or custody is not a trivial matter which the courts may wink at or choose to overlook when convenient. The Board was absolutely correct in overturning the firing on this critical ground. The award of the Board, however, provides that reinstatement is to occur without back pay. (P. App. 19a). There is no explanation as to the reasoning for the denial of back pay.

The Middle District Court attempted to provide this missing explanation. The Court noted on Page 4 of its Memorandum that:

> "A fair reading of the decision indicates that, while it is believed that the deficiency in the record did not justify discharge, the record was insufficient to justify a suspension without pay for having used marijuana." (P. App. 12a).

The citation from Page 4, however, is not a fair reading of the Board's decision. The Board's decision was that the second test was rendered unreliable by the failure to provide adequate testimony as to the critical issue of chain of custody. The result of this decision was quite simply: no evidence to prove the use of marijuana.

The Middle District's Memorandum, therefore, is illogical on this critical ground. If the one piece of evi-

dence is entirely tainted on the issue of dismissal, must it not likewise be entirely tainted on the interrelated issue to back pay? Consolidated Rail Corporation has argued that the Board must have used this tainted evidence in order to reduce the discipline. This argument, which was adopted by the Middle District Court, has no basis in law or in the Board's Order.

In a very recent Ninth Circuit decision, *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company*, 838 F.2d 1087 (9th Cir. 1988), it was held that the Fourth Amendment right to privacy is paralleled by a right of employees to an expectation of privacy between the employee and employer. An employee has the right to certain expectations concerning an employer's invasion of this privacy.

Just as justice requires that the Fourth Amendment has parallels in non-governmental employer/employee relationships, so, too, does it require that there is a uniformity in the application of the rules of evidence between administrative proceedings and state and federal adjudicatory proceedings. A person's rights which require protection in the court system need no less protection in the setting of an administrative hearing when the decision rendered can have just as far reaching and damaging effects as in the formal court environment as seen here.

Consolidated Rail Corporation did not raise any objections to the Board's clear finding that there was insufficient proof as to chain of custody. This finding was binding on the Middle District Court. The Middle District ignored the importance of the Board's evidentiary finding. The purpose of proof of chain of custody is to

show that the sample was not altered or that the sample was from Donald Moore. If Consolidated Rail Corporation could not prove that the sample was not altered or that the sample was from Donald Moore, the results of the analysis of the sample are irrelevant. The Middle District Court erred by even mentioning the results of the test, as a basis for a decision.

Paragraph 15 of the Petition alleges that denial of back pay is contrary to the Collective Bargaining Agreement and that the Special Board of Adjustment exceeded its authority and was without jurisdiction under the Railway Labor Act to deny back pay. Article G-C-9(h) of the Collective Bargaining Agreement specifically provided that where discipline is expunged, the engineer shall be paid for such wage losses incurred. (P. App. 21a through 23a).

In a case discussing denial of back pay under the Railway Labor Act, it has been held that it is proper to determine whether the Collective Bargaining Agreement gave the Special Board of Adjustment the authority to make its award as it did. *Zeviar v. Local 2747 Airline, etc., Employees,* 733 F.2d 556, 559 (8th Cir. 1984). In the matter confronting this Court, the Collective Bargaining Agreement has spoken as to this issue. The Board may not simply ignore the language in Article G-C-9(h).

It has been held that where the award drew its essence from the Collective Bargaining Agreement, the Court may not review the merits of the award. *Id.* Conversely, it must be true that where the award issued ignores the Collective Bargaining Agreement, this Court should and must review the decision.

As stated previously, Subsection (q) of Section 153 (First) permits review of Special Board of Adjustment decisions which fail to confine to matters within the scope of its jurisdiction. Donald H. Moore has met this burden. Denial of back pay is clearly outside the Board's jurisdiction that the Board ignored the Collective Bargaining Agreement in reaching its decision.

Furthermore, awards of the Special Board of Adjustment are subject to review if they are wholly baseless and completely without reason. In this case, it is alleged that Donald H. Moore was exonerated of the charges. He was punished nevertheless. This is clearly improper. If the Board of Adjustments is to punish Donald H. Moore as it did, some reasonable basis must exist and must be stated in the Order.

This separate ground for review was established by the United States Supreme Court in *Gunther v. San Diego and Arizona Eastern Railway Co.*, 382 U.S. 257, 86 S. Ct. 368, 15 L.Ed.2d 308 (1965). See also *Rinker v. Penn Central Transportation Co.*, 350 F. Supp. 217, 219 (E.D. Pa. 1972). It has also been held that the Board's decision is outside its jurisdiction if the decision is without foundation and reason in fact or is wholly baseless and without reason. *Grimes v. Louisville and Nashville R. Co.*, 583 F. Supp. 642, 641 (S.D. Indiana 1984).

B. IT IS AGAINST PUBLIC POLICY TO ALLOW SPECIAL BOARDS OF ADJUSTMENT TO RULE ON MATTERS AND NO COMPETENT EVIDENCE AS A BASIS FOR THE DECISION AND TO ALLOW THAT DECISION TO STAND ABSOLUTE WITH NO REVIEW AVAILABLE TO THE PARTIES INVOLVED.

The Special Board of Adjustment was created to solve minor disputes arising out of interpretation or applica-

tion of an existing agreement. *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company,* 838 F.2d 1087 (9th Cir. 1988). When such a board needs to make decisions on matters as sensitive and important as the propriety and competency of particular drug testing strict compliance with the rules of evidence is proper and just. Issues such as drug testing involve parallel rights of the fundamental constitutional right to privacy and as such demands a particularly specific degree of uniformity between administrative hearings and the court system. To allow an administrative board to make decisions wholly baseless and without reason and without review available is to return to a McCarthy style of adjudicatory proceedings which is without a doubt against the public policy of this Court and this Nation.

—o—

CONCLUSION

In this case, there is nothing in the decisions which could possibly justify Donald H. Moore's severe punishment. Consolidated Rail Corporation has stated that Page 3 of the Board's decision indicated a finding that Donald H. Moore tested positive for marijuana. This is a misstatement in the Board's decision. The Board's decision was that the procedure used for the keeping of the positive specimen was so inadequate that it could not support the decision to fire Donald H. Moore. If specimen procedures were so inadequate that Donald H. Moore could not be fired based upon a positive reading, how can the same specimen be used to punish Donald H. Moore? This rea-

soning is clearly illogical and not based upon fact or reason.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5739

MOORE, DONALD H.,

Appellant

v.

CONSOLIDATED RAIL CORPORATION

On Appeal from the United States District Court
for the Middle District of Pennsylvania
Civil Action No. 87-0917
District Judge: Honorable William W. Caldwell

Submitted Pursuant to Third Circuit rule 12(6)
March 8, 1988

BEFORE: WEIS, GREENBERG, and ALDISERT,
Circuit Judges

(Filed Mar. 11, 1988)

MEMORANDUM OPINION

GREENBERG, *Circuit Judge*

Petitioner, Donald H. Moore, appeals from an order entered in the district court on September 25, 1987 dismissing his petition to review an award made by a Special Board of Adjustment following a hearing under the Railway Labor Act reinstating him without back pay following his discharge by respondent, Consolidated Rail

Corporation, for the alleged use of marijuana on Conrail's property. The facts significant to us for this appeal are not in dispute.

In July 1985 Conrail received an anonymous call stating that Moore was using drugs. Consequently, Conrail required that Moore submit to a urine analysis on July 25, 1985. Unfortunately, however, the sample from that test was lost and then when recovered was found to be inconclusive. On August 2, 1985 he was again tested. The Board described the procedure for this second test as follows:

> The test took place at Carrier's Regional Medical Office at Philadelphia and Carrier's Dr. Brindisi, Registered Nurse Farrell and Health Service Manager McGee were present at the time. The container holding the specimen was handed by claimant to Dr. Brindisi immediately after it was given and the Doctor in turn gave it to Ms. Farrell who placed the container with the specimen in another container properly labeled and secured by a cap. She then placed it in a labeled bag with a note for Metpath Laboratories requesting analysis and report. That procedure took place at about noon and about two hours later the bag was picked up by a Metpath messenger.

This report of the test was understood by the Board to be positive for marijuana. Though Moore does not concede the accuracy of the report he does not suggest that the Board's understanding of what the report meant is incorrect.

As a result of the report Conrail, after a hearing, discharged Moore who then administratively appealed as authorized by 45 U.S.C. § 153. The appeal was heard by a

three member Board with a neutral chairman and a carrier and an employee member. *See United Steelworkers of America v. Union Railroad Co.*, 648 F.2d 905 913 (3d Cir. 1981). In its decision the Board noted that Moore had a reasonably good record with discipline having been imposed on him twice in 15 years. The Board recognized that the use of a narcotic by an engineer is a serious matter but cautioned that an employee should be disciplined only on the basis of appropriate evidence. It indicated that Conrail had made a determined effort to observe most of the requirements to make an appropriate case but that "[t]he record is not as clear as it should be, however, since there is no clear evidence as to chain of possession during transit from Carrier to the Laboratories and of the Laboratories' procedures."

The Board said that upon "weighing all aspects of the case, the hazards involved, the respective interests of the parties and the shortcomings in the record, it is our conclusion that claimant should be reinstated with seniority unimpaired but without back pay." It pointed out that it would not have reinstated Moore despite errors made by Conrail if the record had established a reasonable doubt that he could be relied on as an engineer. It said that before he could return to active duty he must pass a physical examination including a drug screening.

Moore filed a petition for review of the award in the district court seeking a remand of the matter to the Board so that he could be awarded back pay. Conrail subsequently moved to dismiss the petition for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In a memorandum opinion on September 25, 1987 Judge Caldwell granted this motion. He indicated

that Moore argued that he was entitled to relief because the collective bargaining agreement governing his employment provided that when discipline is expunged an engineer who has a wage loss shall be paid for the loss. Here, according to Moore, the discipline had been expunged and thus he was entitled to back pay. The judge rejected this contention as he found that:

> The Board did not expunge the discipline or find the petitioner not guilty of having used marijuana. A fair reading of its decision indicates that, while it believed that the deficiencies in the record did not justify discharge, the record was sufficient to justify a suspension without pay for having used marijuana. In this light, the Board, as the respondent asserts, merely reduced the discipline, and the failure to award back pay consequently did not ignore the agreement. We cannot disturb a decision which draws its essence from the collective bargaining agreement.

Moore further argued that once the Board concluded that there were procedural irregularities concerning the sample, it necessarily had to conclude that there was no basis for finding that he had been using marijuana and thus he should have been awarded back pay. The judge rejected this argument as he found no statutory basis for setting aside the Board's order, citing *Union Pacific R.R. Co. v. Sheehan*, 439 U.S. 89, 99 S.Ct. 399 (1978). He further indicated that the Board's decision was not irrational and without foundation. On September 25, 1987 the judge entered the order granting Conrail's motion from which Moore appeals.

On this appeal Moore asserts that Judge Caldwell's ruling was flawed as a "piece of evidence," the test report, if "entirely tainted" for one purpose, dismissal, was also tainted for purposes of denial of back pay. He also

argued, as he did in the district court, that the collective bargaining agreement required the back pay award.

We affirm substantially for the reasons set forth by Judge Caldwell and note that cases decided after he ruled support his result. *See United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 108 S.Ct. 364 (1987); *United States Postal Service v. National Ass'n of Letter Carriers,* No. 87-3501, 3d Cir., decided February 5, 1988. We do, however, add the following comment. While there is logic in Moore's argument that evidence is either tainted or not, there was some proof of a chain of custody. We read the record to mean that while this chain was not perfect the Board was to some degree accepting the test results. This understanding is buttressed by the fact that the Board required Moore to go through a drug screening before returning to work. If the Board did not think there was a drug problem here it is difficult to comprehend why it would have ordered the screening. Thus, though Conrail accepts the award of the Board, the inconsistency, if any, in its award may have been in ordering Moore's reinstatement rather than denying him back pay.

Conrail in its brief asks for damages under Fed. R. App. P. 38. While we reject Moore's appeal, as we have indicated there is a certain logic in his position. In the circumstances we cannot find Rule 38 applicable here.

The order of September 25, 1987 will be affirmed.

TO THE CLERK:

Kindly file the foregoing opinion.

/s/ Morton J. Greenberg
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5739

MOORE, DONALD H.,
Appellant

v.

CONSOLIDATED RAIL CORPORATION

On Appeal from the United States District Court
for the Middle District of Pennsylvania

Civil Action No. 87-0917

District Judge: Honorable William W. Caldwell

BEFORE: WEIS, GREENBERG, and ALDISERT,
Circuit Judges

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Middle District of Pennsylvania, and was submitted under Third Circuit Rule 12(6) on March 8, 1988.

On consideration whereof, it is now here ordered and adjudged by this court that the order of the District Court entered on September 25, 1987, be and the same is hereby affirmed.

Costs shall be taxed against appellant.

ATTEST:

/s/ Sally Mrvos
Clerk

March 11, 1988

Certified as a true copy and issued in lieu
of a formal mandate on April 4, 1988

Test: /s/ M. Elizabeth Ferguson
Chief Deputy Clerk, United States Court of
Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DONALD H. MOORE, Petitioner	)	
vs.	)	CIVIL ACTION NO. 87-0917
CONSOLIDATED RAIL CORPORATION, Rsspondent	)	

MEMORANDUM

(Filed Sep. 25, 1987)

Introduction

This case comes before the court on respondent, Consolidated Rail Corporation's (Conrail), motion to dismiss for failure to state a claim upon which relief can be granted under Fed. R. Civ. Pro. 12(b)(6). We grant respondent's motion.

Background

Petitioner, Donald H. Moore, has filed a petition for review and enforcement, pursuant to Section 3 (First) of the Railway Labor Act. 45 U.S.C. § 153 (First). He seeks to modify a decision of the Special Board of Adjustment (Board) which, while reinstating him to his railroad engineer's job with Conrail, did so without back pay, the relief he seeks in the instant petition. Petitioner was an engineer with Conrail from 1971 until his discharge on September 24, 1985. In August of 1985, respondent had suspected that Moore was using drugs while at work. Accordingly, Conrail tested petitioner s urine on two separate occasions. Moore's second test was positive for the

presence of marijuana metabolites. Respondent held a hearing on September 24, 1985 at which time Moore was dismissed, based on the results of this test, for using marijuana while on company property under pay and subject to duty.

Petitioner appealed his dismissal to the Board pursuant to the Act. The Board reinstated petitioner effective January 30, 1987, but it did not award him back pay. In doing so, the Board concluded that the record of the Conrail hearing resulting in petitioner's discharge did not adequately show the chain of possession of the urine sample from Conrail to the testing laboratory or the laboratory's procedures in testing the sample. It noted its concern for procedural rights when the charged misconduct could result in a loss of livelihood, but also emphasized Conrail's "determined efforts" to meet those requirements. Thus, the Board noted that a physician and nurse testified to the circumstances surrounding the taking of the sample and its identification and the existence of the laboratory report, showing the presence of marijuana metabolites. The Board then stated: "Upon weighing all aspects of the case, the hazards involved, the respective interests of the parties and the shortcomings in the record, it is our conclusion that claimant should be reinstated with seniority unimpaired but without back pay."

Discussion

The jurisdiction of federal courts to review decisions of the Special Board of Adjustment is statutorily limited. The court has jurisdiction to hear an appeal of a Board decision only ". . . for failure of the [Board] to comply

with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the [Board's] jurisdiction, or for fraud or corruption by a member of the [Board] making the order." 45 U.S.C. § 153 (first) (q) (brackets added). This is a very narrow standard of review. *See United Steelworkers of America v. Union Railroad Co.*, 648 F.2d 905 (3d Cir. 1981). Plaintiff has alleged neither violations of chapter 153 nor that the Board acted fraudulently or corruptly. We may therefore only set aside its decision if it exceeded its jurisdiction when it failed to award back pay in alleged violation of the Agreement.[1]

Petitioner's first argument is based on the following language found at Article G-C-9(h) of the collective bargaining agreement. (Complaint, Exhibit B):

> When discipline assessed as a result of a formal investigation is subsequently expunged, an engineer who has incurred wage loss shall be paid for such wage loss incurred. When discipline assessed is subsequently reduced, an engineer who has incurred wage loss shall be paid for such wage loss during any period not part of his final discipline assessment."

Petitioner contends that the Board expunged the discipline by concluding that there were procedural irregularities in the handling of his urine sample and consequently reinstating him. Hence, the clear language of the agreement required an award of back pay as well. We disagree.

---

1. We reject petitioner's claim that we may reverse the Board if its decision was wholly baseless and without reason. In any event, even if we agreed with petitioner, the Board's decision, as shown below, would not have fallen short of that standard.

The Board did not expunge the discipline or find the petitioner not guilty of having used marijuana. A fair reading of its decision indicates that, while it believed that the deficiencies in the record did not justify discharge, the record was sufficient to justify a suspension without pay for having used marijuana. In this light, the Board, as the respondent asserts, merely reduced the discipline, and the failure to award back pay consequently did not ignore the agreement. We cannot disturb a decision which draws its essence from the collective bargaining agreement. *See Zeviar v. Local No. 2747,* 733 F.2d 556 (8th Cir. 1984).

Petitioner's next argument is that once the Board concluded that there were procedural irregularities concerning the sample, it necessarily had to conclude that there was no basis for finding that petitioner had been using marijuana. Without that finding, it was completely irrational to deny back pay. We have already rejected petitioner's argument that we may use an absence of rationality standard in reviewing the Board's decision. The Supreme Court has "time and again emphasized" that we are limited to the grounds for review provided by the Act. *Union Pacific Railroad Co. v. Sheehan,* 439 U.S. 89, 93, 99 S.Ct. 399, 402, 58 L.Ed.2d 354, 359 (1978) (per curiam). In any event, in accordance with our discussion above, we do not find the Board's decision irrational or without foundation.

We will issue an appropriate order.

/s/ William W. Caldwell
William W. Caldwell
United States District Judge

Date: September 25, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DONALD H. MOORE,	)	
	)	
Petitioner	)	
	)	
vs.	)	CIVIL ACTION
	)	NO. 87-0917
CONSOLIDATED RAIL CORPORATION,	)	
	)	
	)	
Respondent	)	

ORDER

(Filed September 25, 1987)

AND NOW, this 25th day of September, 1987, it is ordered that:

1. Respondent's motion to dismiss the petition is granted.

2. The petition is hereby dismissed.

3. The Clerk of Court shall close this file.

/s/ William W. Caldwell
William W. Caldwell
United States District Judge

Award No. 848

Case No. 848

Special Board of Adjustment No. 894

PARTIES TO DISPUTE:

Brotherhood of Locomotive Engineers
and
Consolidated Rail Corporation

STATEMENT OF CLAIM:

Appeal by Engineer D. H. Moore from dismissal on September 24, 1985. Claim for removal of discipline and payment for all time lost, including reasonable compensation for mental and physical duress, travelers benefits, dental plan, Title VII allowance, vacation rights and retirement benefits.

FINDINGS:

Claimant was dismissed, after a hearing had been held on due notice, for using marijuana while on Company property, under pay and subject to duty on August 2, 1985.

Claimant had a reasonably good record. In the course of 15 years service as a locomotive engineer he had been disciplined twice, a reprimand in 1981 and a five-day suspension in early 1984 for train operating errors. So far as the record shows, there is no competent indication that he had engaged in a Rule G violation prior to August 1985. The fact that he had a good prior record would not protect him from dismissal if he were found guilty of using drugs.

Regional Road Foreman Black's suspicions were roused in July, 1985 when he received an anonymous telephone call that claimant was using drugs. On the strength of that

call, claimant was given a urine test on July 25, 1985 at one of Carrier's medical facilities, but that test was then temporarily lost and then found insufficient to be of confirming value.

Accordingly, claimant was again tested, this time on August 2, 1985, when he was not operating a train but was on the engineer's extra list. The test took place at Carrier's Regional Medical Office at Philadelphia and Carrier's Dr. Brindisi, Registered Nurse Farrell and Health Service Manager McGee were present at the time. The container holding the specimen was handed by claimant to Dr. Brindisi immediately after it was given and the Doctor in turn gave it to Ms. Farrell who placed the container with the specimen in another container properly labeled and secured by a cap. She then placed it in a labeled bag with a note for Metpath Laboratories requesting analysis and report. That procedure took place at about noon and about two hours later the bag was picked up by a Metpath messenger.

Metpath's report of August 4, 1985 advised Carrier that the specimen was positive,

"THC, urine, GT 50 micrograms per liter."

It is quite apparent that the use of a narcotic by a locomotive engineer is a matter of serious concern to his employer and indeed to the public. That it provides a valid basis for dismissal is equally clear. Nevertheless, the gravity of the drug problem does not relieve an employer from making certain that the engineer is accorded all the procedural protection that elementary principles of due process, fair play and common sense requires. Mere su-

spicion, conjecture and hearsay may never be substituted for competent proof.

In any such case, qualified witnesses should be made available to furnish information, on direct and cross examinations, as to the nature and effect of the chemical substance involved, the manner in which the test was given; the procedures or protecting the specimen during time delays, transit and storage, and the details regarding analysis at the Laboratory.

In brief, it must be shown that the rights of the individual have been protected. And that obligation becomes all the more sensitive and important when the misconduct imputed to him is particularly serious and reprehensible and gives rise to loss of livelihood.

In the present case, Carrier made a determined effort to observe most of these requirements. It did not rely on the anonymous call to Black. The findings as to the taking of the test were based on testimony by a physician, a registered nurse, and the health facility manager; the findings regarding the analysis rest on Metpath Laboratories' report.

The record is not as clear as it should be, however, since there is no clear evidence as to chain of possession during transit from Carrier to the Laboratories and of the Laboratories' procedures.

Upon weighing all aspects of the case, the hazards involved, the respective interests of the parties and the shortcomings in the record, it is our conclusion that claimant should be reinstated with seniority unimpaired but without back pay. In reaching this decision, we have not

been impressed by Petitioner's hearing procedure objections; they do not constitute reversible error. Nor have we given undue weight to the fact that claimant's tests were prompted by an anonymous telephone call, although no complaint had been received from any supervisor or employee regarding claimant's vigilance, judgment and conduct.

In any event, this Board would not have reinstated claimant, despite errors on Carrier's part, if the record had established a reasonable doubt that claimant could be relied on as an engineer. Before returning to active duty, claimant must pass a return to duty physical examination, including a drug screen as well as any necessary rules examination.

AWARD:

Claimant reinstated without back pay. To be effective within 30 days.

Adopted at Philadelphia, PA, December 22, 1986.

/s/ Harold M. Weston
Harold M. Weston, Chairman

Illegible
Carrier Member

/s/ R. W. Godwin
Employee Member

ARTICLE G-C-9—Time Allowance—Attending Investigations

(a) If an engineer is not disciplined after being required to attend a formal investigation and loses time on his regular assignment or turn in a pool or extra list, he shall be paid for the time lost due to his attendance at the investigation.

(b) If an engineer is not disciplined after being required to attend a formal investigation at his base terminal and loses no time on his regular assignment or turn in a pool or extra list, he shall be paid for attending the investigation as follows:

(A) If his attendance is immediately before or after his tour of duty, the time spent at the investigation shall be paid for continuous with his tour of duty.

(B) If his attendance is not immediately before or after his tour of duty or is on his assigned day off, actual time spent at the investigation shall be paid for at the straight time rate of pay of the last service performed with a minimum of one day's pay.

(c) (1) When an engineer is not disciplined after being required to attend a formal investigation at other than his home terminal, for attending the investigation he shall be paid on a continuous time basis at the basic daily rate of pay applicable to the last service performed computed from the time he starts from his home terminal and ending at the time he returns thereto with a minimum of one day's pay, except as provided in paragraph (c) (2). Continuous time spent traveling from and to the home terminal shall be computed on the basis of 1.5 minutes for each mile traveled via the best route and added to the time spent at the investigation.

(2) If an investigation is recessed on the first day and continued on the succeeding day or days and the engineer is held over, the continuous time payment shall cease at the time the investigation is recessed on the first day. If such investigation is reconvened the next day and again recessed, the engineer held over shall be paid actual time for attending the investigation with a minimum of one day's pay. When the investigation is reconvened, completed, and the engineer is authorized to return to his home terminal, he shall be paid on a continuous time basis computed from the time the investigation was reconvened on that day until he returns to his home terminal with a minimum of one day's pay.

(3) When the time lost to attend a formal investigation is greater than the total payment provided for in this paragraph (c), the engineer shall be paid for the time lost.

(d) (1) When an engineer is authorized to use other than rail transportation, he shall be reimbursed for out of pocket cost of authorized transportation: when authorized to use his own automobile he shall be reimbursed for the mileage travelled at the applicable car mileage rate paid by the Corporation.

(2) When an engineer is held over at other than his home terminal to attend a reconvened formal investigation he shall be permitted to use lodging facilities provided by the Corporation at that location. If no such lodging facility is available other suitable lodging shall be provided.

(e) When an engineer is required to attend a formal investigation while he is already under pay, no additional payment is due.

(f) The foregoing paragraphs (a), (b), (c), (d), and (e) shall also apply to an engineer who is directed by the Corporation to attend a formal investigation as a witness.

(g) Except when held out of service because of involvement in a serious act or occurrance, an engineer in pool or extra service required to attend a formal investigation shall if unable to accept call for his assignment due to attendance at an investigation be marked up as follows:

(1) An engineer in a pool where a pool engineer is replaced by an extra engineer when he marks off shall be marked up at the bottom of the pool when the extra engineer taking his place returns.

(2) An engineer in a pool where a pool engineer is not replaced by an extra engineer when he marks off or an engineer on an extra list shall be marked up at the bottom of the pool or extra list in the same manner as if he were called for the assignment.

(h) When discipline assessed as a result of a formal investigation is subsequently expunged, an engineer who has incurred wage loss shall be paid for such wage loss incurred. When discipline assessed is subsequently reduced, an engineer who has incurred wage loss shall be paid for such wage loss during any period not part of his final discipline assessment. An engineer paid pursuant to this paragraph shall not be entitled to payment under paragraph (a).

(2)

Supreme Court, U.S.
FILED
JUL 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1987

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DONALD H. MOORE,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

BRIEF OF RESPONDENT CONSOLIDATED RAIL CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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July 6, 1988

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's dismissal of a petition to review an arbitration award where the petitioner failed to allege any of the three extraordinarily narrow grounds for judicial review of such awards provided under Section 3 First (q) of the Railway Labor Act?

PARTIES BELOW

Petitioner Donald H. Moore was the petitioner in the district court and the appellant in the court of appeals. Respondent Consolidated Rail Corporation was the respondent in the district court and the appellee in the court of appeals.

Respondent has no parent corporation(s). It has the following affiliates and non-wholly-owned subsidiaries:

The Akron & Barberton Belt Railway Company

Albany Port Railway Corporation

American Casualty Excess Insurance, Ltd.

The Belt Railway Company of Chicago

Chicago & Western Indiana Railway Company

Indiana Harbor Belt Railroad Company
Calumet Western Railway Company

The Lakefront Dock and Railroad Terminal Company

The Monongahela Railway Company

Nicholas, Fayette & Greenbrier Railroad Company

Peoria & Pekin Union Railway Company

Pittsburgh Chartiers & Youghiogheny Railway Company

Railroad Association Insurance, Ltd.

Trailer Train
Calpro Company
Railbox Company
Trailer Train Finance, N.V.

Transportation Data Xchange, Inc.

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No. 87-1987

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DONALD H. MOORE,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

BRIEF OF RESPONDENT CONSOLIDATED RAIL CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent Consolidated Rail Corporation ("Conrail") respectfully requests that the Court deny the Petition for Writ of Certiorari, seeking review of the judgment of the United States Court of Appeals for the Third Circuit entered on March 11, 1988.

STATUTE INVOLVED

The Petition involves certain provisions of the Railway Labor Act ("RLA"), 45 U.S.C. §§153 First and 153 Second. The relevant portions of these provisions are set forth in Respondent's Appendix.

COUNTERSTATEMENT OF THE CASE

Petitioner Donald H. Moore ("Moore" or "Petitioner") was employed by Respondent Consolidated Rail Corporation ("Conrail") as a locomotive engineer until September 24, 1985 when he was discharged for using marijuana while on duty. Thereafter, pursuant to the collective bargaining agreement between Conrail and Moore's union, the Brotherhood of Locomotive Engineers ("BLE"), and in accordance with the dispute resolution procedures mandated by the Railway Labor Act, 45 U.S.C. § 153 First, Moore appealed his dismissal to a Special Board of Adjustment which reinstated him with full seniority rights but denied his claim for back pay.

The Adjustment Board's award was premised on its review of evidence presented at Moore's disciplinary hearing regarding urinalysis drug screens given to Moore. The testing was prompted by an anonymous telephone call to Moore's supervisor. The evidence showed that because the results of a first test were subsequently misplaced, Moore was administered a second test that revealed the presence of marijuana metabolites. The Board concluded that Conrail had made a determined effort to provide Moore with adequate procedural protections, but that the evidence was "not as clear as it should be" with respect to the chain of custody of Moore's urine sample. Because Moore had a reasonably good disciplinary record, and because of the shortcomings in the chain of custody, the Board concluded that Moore should be reinstated with seniority unimpaired, but without back pay. (Petitioner's Appendix at 15A).

Moore then instituted an action in the United States District Court for the Middle District of Pennsylvania under the provisions of Section 3 First (q) of the Railway Labor Act, 45 U.S.C. § 153 First (q), seeking to modify that portion of the Board's award which had denied him back pay. Applying the very limited standard of review of

arbitration awards set forth in the Railway Labor Act, the district court dismissed Moore's petition because of his failure to allege any of the recognized statutory grounds for overturning arbitration awards set forth in Section 3 First (q). The district court rejected Moore's contention that the Board had misinterpreted the collective bargaining agreement in denying him back pay. Accordingly, the court found that:

> The Board did not expunge the discipline or find the petitioner not guilty of having used marijuana. A fair reading of its decision indicates that, while it believed that the deficiencies in the record did not justify discharge, the record was sufficient to justify a suspension without pay for having used marijuana. In this light, the Board, as the respondent asserts, merely reduced the discipline, and the failure to award back pay consequently did not ignore the agreement. We can not disturb a decision which draws its essence from the collective bargaining agreement.

(Petitioner's Appendix at 11A).

The district court also rejected Moore's argument that it should apply an "absence of rationality" standard in reviewing the Board's decision. The court held that "[t]he Supreme Court has 'time and again emphasized' that we are limited to the grounds for review provided by the Act." (Petitioner's Appendix at 11A, *citing Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 93 (1978)).

Moore appealed the district court's dismissal to the United States Court of Appeals for the Third Circuit, which affirmed the decision for substantially the same reasons as were set forth in the district court decision. (Petitioner's Appendix at 1A-5A).

SUMMARY OF REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari should be denied because the legal standards for judicial review of arbitration awards under the Railway Labor Act, which are well established both by the Act itself and the decisions of the Court, were correctly applied by the district court and Third Circuit. Moreover, there are no compelling or important reasons for granting *certiorari*, as this case turns on its own facts and is of importance only to the litigants. The Petition seeks only to have the Court review evidence previously presented to an Adjustment Board under the RLA. Such a request does not warrant the exercise of the Court's discretionary power of review.

REASONS FOR DENYING THE WRIT

A. The Courts Below Properly Applied The Legal Standard For Review Of Arbitration Awards Under The RLA.

Both the Third Circuit and the district court correctly applied well-settled precedent of this Court for reviewing arbitration decisions. Therefore, both courts properly rejected Moore's attempts to attack the underlying award of the Special Board of Adjustment by seeking to expand the scope of review beyond the narrow statutory grounds set forth in Section 3 First. Consequently, the Court need not examine the issues presented by the Petition, as they are well settled by the statute and decisions of the Court.

The Railway Labor Act, 45 U.S.C. §§ 151-188, establishes a comprehensive scheme for federally created rights and responsibilities concerning labor relations within the railroad industry. Among these is the right of an employee or groups of employees to bring

disputes or grievances (called "minor disputes") to binding arbitration. 45 U.S.C. §153 First (i).[1] The Railway Labor Act established the National Railroad Adjustment Board ("NRAB") composed of members appointed by carriers and labor organizations, functioning through divisions, to decide grievances. A neutral arbitrator is appointed to a panel to decide disputes where the carrier and labor representatives are deadlocked.

The Railway Labor Act also provides for alternative arbitration tribunals created through collective bargaining agreement. 45 U.S.C. §153 Second. These are called Special Boards of Adjustment. These Boards have the same jurisdiction as the NRAB and their decisions are subject to the same limited judicial review. *United Steelworkers of America, Local 1913 v. Union R.R.*, 648 F.2d 905, 910 (3d Cir. 1981).

The essential element in the statutorily-created grievance arbitration scheme is that "the awards shall be final and binding upon both parties to the dispute." 45 U.S.C. §153 First (m). Thus, the Railway Labor Act provides for limited judicial review by federal courts of awards by the NRAB (or awards of alternative arbitration panels). There are only three limited grounds for review: (a) *failure to comply with the requirements of the Railway Labor Act*; (b) *failure of the Board to conform or confine itself to matters within its jurisdiction*; and (c) *fraud or corruption of a member of the panel making the award*. 45 U.S.C. §153 First (q). [2]

The narrow and limited scope of judicial review of Board awards under the Railway Labor Act has been

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1. Prior to binding arbitration, employee grievances proceed through an elaborate internal grievance procedure involving numerous steps for appeals. 45 U.S.C. §153 First. The full text of this section is provided in the Respondent's Appendix.

2. 45 U.S.C. § 153 First (q), provides a detailed procedure for challenging awards of arbitration panels under the RLA. The full text of this section is provided in Respondent's Appendix.

confirmed in numerous court decisions. The Court has reiterated that courts may review awards only where there exists one of the three narrow grounds for judicial review:

> Judicial review of Adjustment Board orders is limited to three specific grounds: (1) failure of the Adjustment Board to comply with the requirements of the Railway Labor Act; (2) failure of the Adjustment Board to conform, or confine, itself to matters within the scope of its jurisdiction; and (3) fraud or corruption. 45 U.S.C. §153 First (q). *Only upon one or more of these bases may a court set aside an order of the Adjustment Board.* See *Andrews v. Louisville & Nashville R. Co.*, 406 U.S., at 325; *Locomotive Engineers v. Louisville & Nashville R. Co.*, 373 U.S. 33, 38 (1963).

Union Pacific R.R. v. Sheehan, 439 U.S. 89, 93 (1978) (emphasis added).

The policy behind the limited nature of judicial review, as established in the statute and recognized by the courts, is finality. Section 3 First (m) of the RLA, 45 U.S.C. §153 First (m), states in part, ". . . Awards shall be final and binding upon both parties to the dispute." The Court has made it clear: "This Court time and again has emphasized and reemphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board." *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U.S. 257, 263 (1965).

The policy favoring finality in railway labor arbitration awards is just as essential to the statutory scheme today as when it was enacted. The Court has summarized the rationale for statutory finality of these arbitration awards:

> In enacting this legislation, Congress endeavored to promote stability in labor-management relations in

> this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective-bargaining agreements. The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. Congress considered it essential to keep these so-called "minor" disputes within the Adjustment Board and out of the courts. The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations. Normally finality will work to the benefit of the worker: He will receive a final administrative answer to his dispute; and if he wins, he will be spared the expense and effort of time-consuming appeals which he may be less able to bear than the railroad. Here, the principle of finality happens to cut the other way. But evenhanded application of this principle is surely what the Act requires.

Union Pacific R.R. v. Sheehan, 439 U.S. 89, 94 (1978) (citations omitted).

Recently, this Court had occasion to reaffirm the principle of finality in labor arbitration awards, albeit in the context of a non-Railway Labor Act award. In *United Paperworkers Int'l Union v. Misco*, __ U.S. __, 108 S. Ct. 364 (1987), the Court held that a federal court may not set aside, on alleged public policy grounds, a labor arbitration award ordering reinstatement of an employee discharged for possession of drugs. This Court concluded that an arbitrator's allegedly grievous error in failing to find sufficient evidence of marijuana possession did not amount to a showing that the arbitrator violated public policy in reinstating the employee. The Court held, in part:

> Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts . . . [W]here it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined.

United Paperworkers In'tl Union v. Misco, supra, __ U.S. __, 108 S.Ct. at 370-71. Clearly, under these standards, further review of the Adjustment Board's decision is not merited.

B. No Non-Statutory Grounds Exist For Reviewing The Adjustment Board's Award.

The Court has previously held that there are no additional grounds for judicial review of Adjustment Board awards other than those set forth in Section 3 First (q) of the RLA. In *Union Pacific R.R. v. Sheehan,* 439 U.S. 89 (1978), the Court rejected the argument that there was a fourth ground of judicial review, lack of due process, in addition to the three statutory grounds. The Court reaffirmed that only the three grounds for review set forth in Section 3 First (q) of the Act provide a basis for review of an NRAB award: "Section 153 First (q) unequivocally states that the 'findings and order of the [Adjustment Board] shall be conclusive on the parties and may be set aside only for the three reasons specified therein. We have time and again emphasized that this statutory language means just what it says." 439 U.S. at 93.

Nevertheless, Moore appears to argue that the right of privacy guaranteed by the Fourth Amendment should somehow be extended to private, non-governmental employer/employee relationships in order to ensure

"uniformity in the application of the rules of evidence between administrative proceedings and state and federal adjudicatory proceedings." (Petition at p.9). Moore also asserts that Adjustment Board awards are subject to review if they are "wholly baseless and completely without reason." (Petition at p.11).

Petitioner's argument that the Court should review the Adjustment Board's award on the basis of some loosely-defined constitutional right to privacy or due process is simply without support. Conrail is not a state actor and its actions in relation to Petitioner or any of its employees are not governed by constitutional strictures. *Morin v. Consolidated Rail Corporation*, 810 F.2d 720 (7th Cir. 1987). *Accord Myron v. Consolidated Rail Corporation*, 752 F.2d 50 (2d Cir. 1985); *Consolidated Rail Corporation v. Metro-North Commuter R.R.*, 638 F. Supp. 350, 354 (Sp.Ct. R.R.R.A. 1986). In *Morin*, the Seventh Circuit considered a similar question: whether an employee who appealed from an Adjustment Board award upholding his dismissal was entitled to the protections of the Fifth Amendment's due process clause due to Conrail's relationship to the federal government. The Seventh Circuit held that Conrail was *not* an entity of the federal government for purposes of the due process clause and thus was not constrained by the Fifth Amendment. The Seventh Circuit further held that the employee's allegations of lack of due process at his arbitration hearing did not warrant setting aside the Adjustment Board's decision in light of the very limited standard of judicial review.

The RLA simply does not contemplate a "wholly baseless" ground for judicial review. Petitioner argues that this standard was established by the Court in *Gunther, supra*, 382 U.S. 257 (1965). However, Petitioner has taken the Court's dicta in *Gunther* well beyond its intended meaning. In *Gunther*, the Court

held that judicial review was limited to the three statutory criteria. As the Court's decision in *Sheehan* confirmed, *Gunther* did not create a fourth ground for review of Adjustment Board awards.

There is also no merit to Petitioner's claim that the Adjustment Board was required to order back pay because it ordered reinstatement. The Board was within its power to order reinstatement, but deny back pay and other benefits. The law is well developed that arbitrators are afforded a wide range of flexibility in fashioning remedies in cases brought before them. Appeal of a disciplinary decision is not an all or nothing proposition. Employees routinely ask for reinstatement with back pay and all other lost benefits. Adjustment Boards routinely order something less where they deem it appropriate to do so. A Board clearly has the power to fashion an appropriate remedy, which may include reinstatement without lost pay or benefits. *Air Line Pilots Association, Int'l v. Eastern Air Lines, Inc.*, 632 F.2d 1321 (5th Cir. 1980). In *Diamond v. Terminal Ry. Alabama State Docks*, 421 F.2d 228 (5th Cir. 1970), the Fifth Circuit recognized the necessity of flexibility in the fashioning of arbitral remedies:

> No less than the private arbitrator, the Adjustment Board must have flexibility to deal with the variety of situations it encounters in arbitrating "minor" disputes. The courts, therefore, must be careful not to restrain the Board in a strait jacket of precedent under the guise of determining whether the Board exceeded its jurisdiction in making a particular award.

Id. at 234.

Numerous decisions under the Railway Labor Act affirm an Adjustment Board's power to order an employee to be reinstated, while at the same time denying back pay. *Zeviar v. Local No. 2747, Airline, Aerospace and Allied Employees*, 733 F.2d 556 (8th Cir. 1984). *See*

also Epple v. Union Pacific R.R.-Eastern Div., 558 F. Supp. 63 (D. Colo. 1983); *Grimes v. Louisville & Nashville R.R.*, 583 F. Supp. 642 (S.D. Ind. 1984), *aff'd*, 767 F.2d 925 (7th Cir. 1985), *cert. denied*, 476 U.S. 1160 (1986). The courts do not have the power to review and change the remedy awarded by an Adjustment Board. *Walsh v. Union Pacific R.R.*, 803 F.2d 412 (8th Cir. 1986), *cert. denied*, __ U.S. __, 107 S. Ct. 3213 (1987).

Petitioner raises neither an important nor novel issue relating to the enforcement of the RLA. Thus, the Court should not grant *certiorari*.

C. This Case Turns On Its Particular Facts And There Are No Important Or Compelling Reasons For Granting Certiorari.

In essence, Petitioner is asking the Court to review the Adjustment Board's factual conclusions and to analyze the propriety of factual determinations specific to this case. Neither the clarification nor articulation of disputed legal principles is presented by the Petition. Numerous courts have held that a court may not reweigh the evidence before the Adjustment Board or test its sufficiency. As stated by the Fifth Circuit in *Diamond v. Terminal Ry. Alabama State Docks*, 421 F.2d 228, 233 (5th Cir. 1970):

> The federal courts do not sit as super arbitration tribunals in suits brought to enforce awards of the Adjustment Board. They may not substitute their judgments for those of the Board divisions. They need not inquire whether substantial evidence supports the Board's awards. Under the Railway Labor Act, as amended in 1966, Pub. L. No. 89-456, 80 Stat. 208, the range of judicial review in enforcement cases is among the narrowest known to the law.

Other courts are in agreement. "Although plaintiff may disagree that the evidence underlying the Board's decision is adequate, the sufficiency of the evidence comprising the foundation of the Board's decision is not reviewable. The Board's determination is conclusive." *Anderson v. National R.R. Passenger Corp.*, 754 F.2d 202, 203-4 (7th Cir. 1984). Even as serious a change in circumstances as a recanting witness does not allow a court to re-weigh the evidence to overturn an Adjustment Board award, as the weighing of the evidence is strictly the province of the Adjustment Board. *Woodrum v. Southern Ry.*, 750 F.2d 876 (11th Cir.), *cert. denied*, 474 U.S. 821 (1985).

Reviewing the quantum and quality of the evidence supporting Moore's dismissal was the responsibility of the Adjustment Board. While Moore argues that the evidence was somehow tainted, this assertion does not provide a basis for granting *certiorari*. As the Court has consistently held, it does not "grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). The decision is of importance solely to the litigants in this case, and turns on facts unique to this case. There are no special or important reasons favoring an exercise of the Court's discretionary power of review.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully submits that the Petition should be denied.

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APPENDIX TO BRIEF OF RESPONDENT CONSOLIDATED RAIL CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

§153. NATIONAL RAILROAD ADJUSTMENT BOARD

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to particpate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with sections 151a and 152 of this title and is otherwise properly qualified to participate in the

selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with sections 151a and 152 of this title and which represent employees in engine, train, yard, or hostling service: *Provided, however,* That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however,* That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and in all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division, shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carrriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a

dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a

reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided however*, That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division

making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinios, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall

be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decision shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (l) of this section, with respect to a division of the Adjustment Board.

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to

agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request

the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.